

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of

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Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Quanah, Texas, *et al.*)

) MM Docket No. 00-148 /
) RM-9939
) RM-10198
)

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau**

**JOINT MOTION FOR LEAVE TO SUBMIT RESPONSE AND
JOINT RESPONSE TO REPLY TO PARTIAL OPPOSITION**

Fritz Broadcasting Co., Inc. ("Fritz") and M&M Broadcasters, Ltd. ("M&M"), by their attorney, hereby respectfully submit their Joint Motion for Leave to Submit Response and Joint Response to Reply to Partial Opposition with regard to the above-captioned proceeding. With respect thereto, the following is stated:

Joint Motion for Leave to Submit Response

1. Fritz and M&M previously submitted Joint Reply Comments in the proceeding in response to the Commission's *Public Notice*, Report No. 2500, released August 3, 2001, inviting the submission of such comments with regard to the Counterproposal submitted in the instant proceeding by Next Media Licensing, Inc.; First Broadcasting Company, L.P. ("FBC"); Capstar TX Limited Partnership; Clear Channel Broadcast Licenses, Inc.; and Rawhide Radio, L.L.C. (together, the "Joint Parties"). Accordingly, in light of the timely submission of those Joint Reply Comments, Fritz and M&M are parties to the instant proceeding.

2. Nonetheless, on at least three occasions, the Joint Parties have failed to timely serve on counsel for Fritz and M&M the pleadings which they have filed in the instant proceeding.

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Specifically, on January 16, 2002, counsel for Fritz and M&M received a copy of the Joint Parties' "Reply to Partial Opposition to Motion to Strike," filed on December 26, 2001 ("Reply"). This pleading was faxed with a statement that only as of that date had it come to the attention of counsel for FBC that counsel for Fritz and M&M "may not have received a copy of this pleading" and with apologies for the delay. The Certificate of Service clearly indicates that counsel for Fritz and M&M was **not** timely served with a copy of the pleading in question. Indeed, the Certificate of Service reveals that the Joint Parties did not even serve counsel for the party to which the Reply was addressed, in blatant violation of the Commission's Rules.¹ Thus, Fritz and M&M are seeking to respond to the Joint Parties' pleading promptly upon receipt of the Reply by counsel.

3. Furthermore, the Joint Parties' Reply introduces new information, legal theories, and factual claims concerning Charles Crawford into its Reply. Additionally, and more importantly to Fritz and M&M, the Joint Parties for the first time unequivocally accept and argue vigorously the principle, previously raised by Fritz and M&M in their Joint Reply Comments, that a rule making proposal must protect all previously filed proposals entitled to protection as of the date of filing, regardless of the ultimate disposition of the previous proposal. Fritz and M&M again agree with this principle, and it is important that the principle's ramifications be fully recognized.

Accordingly, as Fritz and M&M have not previously had an opportunity to comment on this matter, and so that the Commission may have a complete record before it, Fritz and M&M hereby

¹ Additionally, a review of the Commission's Electronic Comment Filing System ("ECFS") reveals that the Joint Parties have failed to serve counsel for Fritz and M&M on at least two other occasions. Specifically, the Certificates attached to the "Response to Request for Supplemental Information," filed November 13, 2001, and the "Opposition to Motion to Strike," filed September 13, 2001, demonstrate that the undersigned was not served with copies of either of those pleadings.

seek leave to file the following brief Response.

Response

4. The principle that a rule making proposal must be technically correct **when filed** applies as much to the Joint Parties' Counterproposal as to any other proposal in any other rule making proceeding. The fact remains that the Joint Parties did not meet that standard. Accordingly, by their own reasoning as set forth in their Reply, their Counterproposal must be dismissed.

5. The Joint Parties have now admitted to three separate problems with their Counterproposal as originally filed. These include (1) incorrect coordinates for the proposed transmitter site at Lakeway, (2) the specification of a replacement channel at Quanah which in actuality cannot be used, and (3) a short-spacing to a previously filed upgrade application for KICM(FM), Krum, Texas. The Joint Parties now assert that because they could have made a different proposal, the Quanah error does not matter, and because they could make changes after the fact, the other two problems also are unimportant. Despite all of their blustering pronouncements, however, the Joint Parties cannot get away from the fact that their Counterproposal was *not* fully correct at the time of filing, but rather has required multiple "corrections" since the time of filing. For the Commission to accept such a flawed proposal would set an unfortunate precedent which would encourage the filing of hastily prepared proposals with the notion that any "minor" defects in spacing or site placement could always be corrected later. The result would be a waste of Commission resources in examining proposals which the proponents themselves do not regard as necessarily finalized or complete. Moreover, the reason for the requirement was clearly stated in *Broken Arrow, OK, et al.*, 3 FCC Rcd 6507,

6511 n.2 (Policy and Rules Division 1989), where it was stated:

Counterproposals must be technically correct at the time of their filing so that all parties are afforded an opportunity to respond in reply comments.

Id. at n.2. Accord, *Lockport and Amherst, NY*, 13 FCC Rcd 12304, n.4 (Chief, Allocations Branch 1997) (“[b]ecause there are no pleadings which are authorized by the Commission's Rules beyond responses to counterproposals, counterproponents are expected to include in their counterproposals all relevant information”).

6. Leaving aside for the moment, however, the various arguments concerning the error in placement of the proposed Lakeway transmitter site and the unavailability of the previously proposed Quanah channel, the fact remains that the short-spacing to the KICM(FM) upgrade application represents a fatal flaw in the Counterproposal. As indicated by the file number, BMPH-20000725AAZ, that application was filed on July 25, 2000, *prior* to the release of the *Notice of Proposed Rule Making*, DA 00-1905, in this proceeding on August 18, 2000, and some two and one-half months prior to the filing of the Counterproposal. The Commission's rules and policies make it quite clear that such applications are “cut-off” and not subject to later-filed, mutually exclusive applications or rulemaking proposals following the date of their filing. See *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd 4743 (1993); *Rose Hill, Trenton, Aurora, and Ocracoke, NC*, 15 FCC Rcd 10739, ¶ 8 (Chief, Allocations Branch 2000).

7. While the Commission has made some provision for counterproposals which are timely filed but discovered to be in conflict with previously-filed applications, those provisions are clearly inapplicable in the instant case. Specifically, in order to alleviate difficulties with the cut-off rule, the Commission stated that in cases in which the filing of an FM application makes an

otherwise timely filed counterproposal unacceptable, it would allow the amendment of the counterproposal, within 15 days after the placement of the counterproposal on Public Notice, "to protect the transmitter site of the previously filed application" if "at the time [the counterproponent] filed the counterproposal. it did not know, and could not have known by exercising due diligence, of the pendency of the conflicting FM application." *Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd at 4745 ¶ 16. It is clear in the context of the Commission's *Memorandum Opinion and Order* in that proceeding that this provision was intended to apply in cases in which an FM application was filed *during* a comment period, *e.g.*, immediately prior to the filing of a counterproposal -- a situation which does not exist here.

8. Furthermore, the Joint Parties did not amend their counterproposal to protect the proposed Station KICM(FM) transmitter site. Instead, the Joint Parties merely reached an "agreement" with the current licensee of KICM(FM) that, if the Joint Parties are successful in the instant rule making proceeding, KICM(FM) will file another application with the Commission to downgrade the station..² See "Reply Comments" of Joint Parties, filed August 20, 2001. In the meantime, however, the Joint Parties' proposal remains short-spaced to the now-granted KICM(FM) construction permit, with only the promise of future action at a later date. Indeed, according to the stated terms of the agreement, the Commission would have to grant the Joint Parties' allotment requests with the KICM(FM) short-spacing remaining in place, and that grant would be required to become final, before KICM(FM)'s licensee would have any obligation to

² Fritz and M&M are aware that the Commission has recently issued a request for further information with regard to certain aspects of the agreement with the licensee of KICM(FM). See *Request for Supplemental Information*, DA 02-158, released January 18, 2002.

seek a downgrade. The question then remains as to what would then happen if the current (or a future) KICM(FM) licensee failed to file or prosecute such an application, or if the application were somehow unacceptable.

9. Even more importantly, however, the Joint Parties are ineligible to amend their counterproposal to eliminate the conflict with the KICM(FM) application in any manner. As noted above, the Commission quite clearly provided that, in order for such an amendment to be accepted, it would “require the counterproponent to make a showing that, at the time it filed the counterproposal, it did not know, and could not have known by exercising due diligence, of the pendency of the conflicting FM application.” *Conflict Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 8 FCC Rcd at 4745 ¶ 16. In this case, the Joint Parties admitted in their Counterproposal that they were aware of the KICM(FM) application and of the short-spacing to it. Thus, as with other counterproposals, it is clear that the Joint Parties’ Counterproposal was required to be in compliance with the Commission’s technical rules at the time that it was filed. Such was not the case, and the Counterproposal must therefore be dismissed.

10. The Joint Parties have now argued themselves that, if a rule making proposal is in conflict with a previous, cut-off proposal, it must be dismissed regardless of the outcome of the first proposal. This reasoning must be applied equally to their own counterproposal. Since the Counterproposal was short-spaced to the KICM(FM) application at the time that it was filed, it is irrelevant what has happened (or what “may” happen) with regard to that station after the filing. The critical date was the counterproposal deadline date in this proceeding. The Joint Parties did not meet that deadline. By the force of the Joint Parties’ own argument, their counterproposal

therefore must be dismissed.

WHEREFORE, it is respectfully requested that the Counterproposal filed by Next Media Licensing, Inc.; First Broadcasting Company, L.P.; Capstar TX Limited Partnership; Clear Channel Broadcast Licenses, Inc.; and Rawhide Radio, L.L.C. be dismissed.

Respectfully submitted,

FRITZ BROADCASTING CO., INC.
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January 23, 2002

By: _____

Dan J. Alpert

Their Attorney

CERTIFICATE OF SERVICE

I, Dan J. Alpert, do hereby certify that true copies of the foregoing “Joint Motion for Leave to Submit Response and Joint Response to Reply to Partial Opposition” have been served by First Class Mail, postage prepaid, upon the following:

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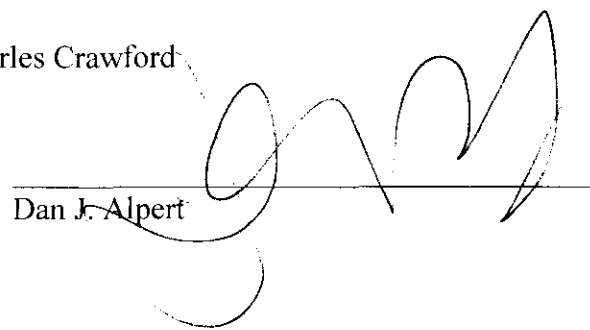
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A large, stylized handwritten signature in black ink, consisting of several loops and flourishes, is written over a horizontal line. The signature appears to be 'Dan J. Alpert'.